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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1414**

In re the Marriage of:
Karen Maureen Rye, petitioner,
Respondent,

vs.

Jay Francis Cook,
Appellant.

**Filed May 5, 2014
Affirmed in part, reversed in part, and remanded
Kirk, Judge**

Hennepin County District Court
File No. 27-FA-12-2909

Anne M. Honsa, Deborah M. Gallenberg, Honsa & Associates, P.A., Minneapolis,
Minnesota (for respondent)

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Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

In this spousal-maintenance dispute, appellant-husband argues that the district
court abused its discretion by: (1) awarding respondent-wife \$19,500 per month in

permanent spousal maintenance; (2) ordering him to secure his spousal-maintenance obligation with a \$1 million life insurance policy; (3) awarding him almost all of the marital debt and respondent all of the proceeds from the sale of the parties' homes; and (4) awarding respondent need- and conduct-based attorney fees. We affirm in part, reverse in part, and remand to the district court.

FACTS

Appellant Jay Francis Cook and respondent Karen Maureen Rye married on January 19, 1985, and separated in September 2011. Rye was primarily a homemaker throughout their marriage. Cook worked as an attorney at the law firm of Dorsey & Whitney LLP from 1973 until he retired in 2006, and was a partner at the firm for 27 years. Since 2007, Cook has been self-employed as an attorney in Naples, Florida. At the time of the dissolution trial, Rye was 62 years old and Cook was 63 years old.

Rye filed a marital-dissolution petition in the district court in April 2012. In July, the district court held a court trial to address the issues of spousal maintenance, asset and debt allocation, and attorney fees. On November 8, the district court issued its detailed findings of fact, conclusions of law, order for judgment, and judgment and decree, ordering Cook to pay \$19,500 per month in permanent spousal maintenance to Rye and to obtain a \$1 million life insurance policy as security for his spousal-maintenance obligation. The district court divided Rye and Cook's assets and debts, which included real estate proceeds, retirement assets, a commercial real estate investment, and credit card debt, and ordered Cook to pay \$37,500 toward Rye's attorney fees.

In December, Cook moved for amended findings and/or a new trial and for a stay of enforcement of the judgment pending a ruling on the posttrial motions and the appeal. In January 2013, Rye moved to hold Cook in constructive civil contempt of court for failing to comply with the November 8 judgment and decree, and the district court signed an order to show cause. Rye also moved for attorney fees that she incurred as a result of responding to Cook's motions. In response, Cook submitted an affidavit asserting that he did not have sufficient resources to comply with the spousal-maintenance order.

The district court denied Cook's motion for a stay, and on March 26, the district court entered a judgment against Cook in the amount of \$37,500 for Rye's attorney fees. In July, the district court granted Cook's motion for amended findings in part, denied it in part, and filed amended findings of fact, conclusions of law, order for judgment, and judgment and decree. The district court also granted Rye's contempt motion and found Cook to be in constructive civil contempt of its order to pay spousal maintenance. The district court denied Rye's request for additional attorney fees, but reserved the request for attorney fees for the appeal. Cook appeals the rulings made in the dissolution. A related appeal is pending in the contempt matter.

D E C I S I O N

I. The district court abused its discretion by awarding permanent spousal maintenance to Rye in the amount of \$19,500 per month.

A district court has broad discretion in decisions regarding spousal maintenance, and we review the district court's maintenance decision for an abuse of discretion. *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). A district court abuses its

discretion if its decision is against logic and the facts in the record. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). We will uphold a district court’s findings of facts regarding spousal maintenance unless they are clearly erroneous. *Gessner v. Gessner*, 487 N.W.2d 921, 923 (Minn. App. 1992). “Findings of fact are clearly erroneous when they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. Aug. 21, 2007). Finally, we review questions of law related to spousal maintenance de novo. *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009).

A district court may award spousal maintenance in a dissolution proceeding if it finds that that the spouse seeking maintenance “lacks sufficient property . . . to provide for [their] reasonable needs considering the standard of living established during the marriage” or “is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment.” Minn. Stat. § 518.552, subd. 1 (2012). “The purpose of a maintenance award is to allow the recipient and the obligor to have a standard of living that approximates the marital standard of living, as closely as is equitable under the circumstances.” *Peterka v. Peterka*, 675 N.W.2d 353, 358 (Minn. App. 2004). The district court may order spousal maintenance in an amount and for a period of time that it deems just. Minn. Stat. § 518.552, subd. 2 (2012).

In making its maintenance decision, the district court shall consider “all relevant factors,” including: (1) the financial resources of the spouse seeking maintenance and the

ability to meet those needs independently; (2) the time necessary for the spouse to acquire sufficient training or education to enable her to find appropriate employment and the probability of her becoming self-supporting; (3) the standard of living established during the marriage; (4) the duration of the marriage and the length of the homemaker's absence from employment and the extent to which her education, skills, or experience have become outmoded and her earning capacity permanently diminished; (5) the loss of earnings, seniority, retirement benefits, and employment opportunities the spouse who is seeking maintenance has foregone; (6) the age and physical and emotional condition of the spouse who is seeking maintenance; (7) the ability of the spouse from whom maintenance is sought to meet both his needs and his spouse's needs; and (8) each spouse's contribution to the value of the marital property, including the contribution of the spouse who acted as a homemaker. *Id.* "No single factor is dispositive, and the district court must weigh the facts of each case to determine whether maintenance is appropriate." *Kampf*, 732 N.W.2d at 634.

Cook does not dispute the district court's award of permanent spousal maintenance to Rye, but he argues that the award of \$19,500 per month is too high. Cook contends that several of the district court's findings in support of its spousal-maintenance award are clearly erroneous. We address each of his arguments in turn.

A. The district court erroneously attributed value to Cook's retirement and pension accounts as both income and marital assets.

Cook first argues that the district court "double dipped" by awarding him retirement and pension accounts as property but also utilizing the amount he receives

from those items of property to determine his ability to pay spousal maintenance, thereby improperly requiring him to use his property award to pay his maintenance obligation after the dissolution judgment became final. *See* Minn. Stat. § 518.003, subd. 3a (2012) (defining “[m]aintenance” as “payments from the future income or earnings of one spouse for the support and maintenance of the other”); Minn. Stat. § 518A.39, subd. 2(f) (2012) (noting that, with exceptions not relevant here, property awards in a dissolution judgment are final). As part of its division of the parties’ assets, the district court awarded Rye \$465,858 from one of the parties’ four retirement assets and awarded the remaining assets to Cook. Cook’s portion of the retirement assets includes a fixed retirement benefit from Dorsey & Whitney worth \$337,949.10, the remaining \$167,909.23 of the retirement account that was awarded to Rye, 100% of his Dorsey & Whitney supplemental pension plan, and 100% of his Dorsey & Whitney deferred compensation plan. The district court determined that Cook currently receives \$10,764 gross income per year from the supplemental pension and \$115,920 per year from the deferred compensation plan. The district court included that income when it determined Cook’s gross yearly income and net monthly income.

As an initial matter, Rye argues that this court should not address this issue because it was not raised to and decided by the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (“A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it.” (quotation omitted)). Although Cook concedes that the issue was not raised before the district court, he argues that this court should consider it

because the district court's decision to "double count" his retirement assets is an error of law that may be challenged on appeal. We are not persuaded by Cook's argument because it is well-settled that *Thiele* applies to legal questions. *Tyroll v. Private Label Chemicals, Inc.*, 505 N.W.2d 54, 56-57 (Minn. 1993). However, we have reviewed this record and find it adequate to address the issue. Therefore, we will exercise our discretion to analyze the issue in the interests of justice. *See* Minn. R. Civ. App. P. 103.04 (stating that appellate courts may address questions in the interests of justice).

In support of his argument that the district court "double dipped," Cook relies on *Lee v. Lee*, 775 N.W.2d 631 (Minn. 2009). In that case, on appeal from a maintenance modification, the Minnesota Supreme Court considered whether the district court erred by excluding the husband's pension benefits that were previously awarded to him as property when calculating his ability to pay maintenance. *Lee*, 775 N.W.2d at 639. The supreme court stated:

When calculating [the husband's] monthly income, considering [the husband's] marital pension benefits previously awarded to him as property would not necessarily divest [the husband] of his marital property; he might have sufficient other income from which to pay the maintenance award. But including marital pension benefits previously awarded as property in [the husband's] income would potentially increase the total amount of [the husband's] maintenance obligation. This is akin to putting money into [the husband's] left pocket while simultaneously removing money from his right pocket, in effect modifying the prior property division without finding the existence of the factors set forth in Minn. Stat. § 518.145, subd. 2.

Id. at 640. The supreme court concluded that the district court properly declined to consider the husband's pension benefits in calculating his ability to pay maintenance. *Id.*

Cook argues that, under *Lee*, the district court erred by including the amounts he receives from both his Dorsey & Whitney supplemental pension plan and deferred compensation plan in its determination of his income for spousal maintenance purposes because the district court awarded those assets to him as part of the property division. We agree. Although *Lee* involved the modification of spousal maintenance rather than the establishment of spousal maintenance that is at issue here, the same reasoning applies in this case. Further, this court has previously stated that “[p]ension benefits awarded as property in a dissolution cannot be included in the income of a party when determining that party’s maintenance obligation.” *Walker v. Walker*, 553 N.W.2d 90, 94 (Minn. App. 1996); *see also Kruschel v. Kruschel*, 419 N.W.2d 119, 123 (Minn. App. 1988).

In addition, the district court specifically found that the pension benefits had value. The district court found that the property settlement was “fair and equitable” and “serves to equalize the parties’ retirement assets by awarding [Cook] the entirety of his Dorsey & Whitney Fixed Retirement Benefit and Dorsey & Whitney Deferred Compensation Plan, while awarding [Rye] a significant portion of [Cook’s] Vanguard SEP IRA # 6928.” The district court found that the retirement accounts were marital property and made findings regarding the specific amount of money that Cook was receiving from the retirement accounts he was awarded.

Therefore, we conclude that the district court erred by including in Cook’s income for maintenance purposes the amounts he received from two of the retirement accounts awarded to him as part of the dissolution judgment’s property division. However, we note that although the district court stated that it intended to “equalize” the parties’

retirement assets, it awarded 100% of two of the accounts to Cook without including their value in its calculation of the amount of the retirement accounts that it awarded to each party. On remand, the district court may choose to reconsider its division of the pension assets so that it accurately reflects its stated intention to equalize the division of those assets.

B. The district court's calculation of Cook's gross income for maintenance purposes is clearly erroneous because it included Cook's pension assets, but otherwise it is supported by the record.

Cook argues that the district court incorrectly calculated his annual gross income for several reasons. As we have already concluded, the district court erred by including in Cook's income for maintenance purposes the amounts from the pension accounts Cook was awarded as property. Cook next contends that the district court failed to take into account his present income, which he argues is lower than his income was the previous five years. "A district court's determination of income for maintenance purposes is a finding of fact and is not set aside unless clearly erroneous." *Peterka*, 675 N.W.2d at 357.

The district court adopted the cash-flow analysis provided by Rye's expert, Howard Kaminsky, CPA. Based on that analysis, the district court found that Cook's gross income from his law firm practice for the past five years averaged \$366,000, or \$30,500 per month. Including the income Cook received from his Dorsey & Whitney retirement accounts, the district court found that Cook's gross yearly income was \$481,099 and his net income was \$400,767 per year, or \$33,397.25 per month.

The district court rejected Cook's argument at trial that his income had decreased in 2012 because it found that Cook had not provided sufficient evidence to support his claim. The district court found that the only evidence Cook submitted in support of his claim was a one-page document analyzing his business income which he prepared himself, but he did not include any documentation to support his conclusions. The district court found that Cook had not provided any information regarding accounts receivable or clients that he had not yet billed for services he performed. In the absence of that evidence, the district court found that Cook's testimony about his anticipated future income was not credible. The district court rejected Cook's argument that the district court should not take into account the income generated by a contract attorney who worked with Cook between 2008 and 2011, because he did not provide any evidence to demonstrate how his business income was affected by his employment of the contract attorney. Finally, the district court noted that Cook had not decreased his spending in order to meet his alleged decrease in income.

The district court's findings are supported by the record and are not clearly erroneous. At trial, the district court admitted Kaminsky's report into evidence. Although the district court's pretrial order provided that experts should be made available at trial for cross-examination, Cook did not object to the admission of the report as an exhibit or request that he be permitted to cross-examine Kaminsky. Cook also did not present testimony or a report from his own expert. Instead, he provided his own critique of Kaminsky's report through testimony. While Cook was qualified to provide this testimony, he did not submit any documentation supporting his claim that his business

had decreased in 2012. He also did not submit any documentation regarding the revenue that the contract attorney who worked for him generated or the expenses associated with employing him. Given the lack of evidence in the record to support his arguments and our deference to the district court's credibility determination, we are unpersuaded by Cook's argument. *See Prah* v. *Prah*, 627 N.W.2d 698, 702 (Minn. App. 2001) (stating that we defer to a district court's credibility determinations); *cf. Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) (stating that a party cannot complain about a district court's failure to rule in her favor when she did not submit the evidence that would allow it to do so), *review denied* (Minn. Nov. 25, 2003).

C. The district court's finding that the parties' marital lifestyle was not premised on debt is not clearly erroneous.

Cook argues that the district court failed to acknowledge that the parties' marital standard of living was built on debt when it considered the standard of living established during their marriage. The district court found that the parties had an upper class standard of living during their marriage. The district court based its finding on several factors, including the parties' 4200-square-foot home in Edina that sold in 2012 for almost \$1 million; condominium in Florida that sold in 2012 for over \$700,000; investment of a substantial amount of money to remodel the Edina home; regular domestic and international vacations; late-model high-end vehicles; golf memberships at three different golf clubs; free spending on both necessary and luxury items; investment in retirement and investment accounts; charitable giving; and timely payment of their expenses. The district court rejected Cook's argument that the parties' standard of living

was premised on debt, citing the evidence in the record that the parties spent freely and Cook paid their credit card balances off or down every month. These findings are supported by the record and are not clearly erroneous.

D. The district court's finding that Rye has reasonable monthly expenses of \$14,001.82 per month is clearly erroneous.

Cook argues that the district court's finding that Rye has \$14,001.82 in reasonable monthly expenses is clearly erroneous because Rye's budget includes numerous speculative and excessive costs. Rye submitted a proposed budget claiming \$14,141.15 in monthly expenses at trial and the district court admitted it as an exhibit. The district court found that Rye's budget was largely supported by her testimony and submitted documentation, and it was consistent with the standard of living that was established during the marriage. The district court did not make specific findings regarding each expense that Rye claimed in her proposed budget. Instead, the district court found that her entire budget, absent \$139.33 in pet expenses because Rye does not have a pet, was reasonable. By doing so, the district court essentially adopted Rye's proposed budget. Based on that budget, the district court found that Rye has \$14,001.82 in reasonable monthly expenses.

Cook challenges Rye's budget of \$2,684.66 for a mortgage, real estate taxes, and homeowners insurance, \$761.60 for utilities, and \$758.25 for home maintenance, repairs, and upkeep. This court has held that a district court's inclusion of a mortgage payment in a party's reasonable monthly budget is clearly erroneous when there is no evidence in the "record concerning when or whether [the party] will begin incurring the mortgage

expense.” *Rask v. Rask*, 445 N.W.2d 849, 854 (Minn. App. 1989). In *Rask*, this court held that it was not enough to “merely estimate[]” that a specific monthly payment “would be required to purchase the type of home she wants.” *Id.* It is undisputed that Rye does not currently have a mortgage. However, as Cook acknowledges, Rye is entitled to budget for housing expenses, and the \$2,684.66 in housing expenses is supported by Rye’s testimony. The record also establishes that throughout this proceeding Cook has been paying Rye approximately the same amount of money—\$3,000 per month—in temporary spousal maintenance for housing. *Cf. Rask*, 445 N.W.2d at 854 (noting that the wife’s living expenses had not changed since the temporary spousal maintenance was ordered). Thus, Rye’s budget for a mortgage is supported by the record.

However, the \$761.60 for utilities and \$758.25 for home maintenance, repairs, and upkeep that Rye budgeted are not supported by any evidence in the record. As Cook notes, many of the home maintenance and upkeep items that Rye budgets are premised on her owning a home, including sprinkler systems, lawn maintenance, snow removal, and landscaping. Similarly, there is no evidence in the record regarding the utility costs that Rye currently incurs. Because Rye does not currently own a home, these expenses are too speculative at this time. *See id.*

Second, Cook objects to the district court’s allocation of \$964.89 per month to Rye to allow her to purchase a new vehicle. The district court found that Rye’s 2001 Mercedes E320 has 110,000 miles, is rusting, needs new tires, and has oil-consumption issues. The district court found that Rye’s budgeted amount for a new car was based on

her conversation with a representative of Sears Auto. The district court also found that Cook and Rye “have driven later model high-end” vehicles. However, the record shows that both Rye and Cook own older high-end vehicles—Cook owns a 2003 Mercedes C240. Rye testified at trial that she recently had approximately \$3,000 worth of repairs done to her vehicle and it now runs fine. Rye also testified that the monthly budget for her to buy a new vehicle was based on purchasing the newest version of her current Mercedes. Although she testified that she considered buying a vehicle that was not a Mercedes, she testified that she has not looked at purchasing a different vehicle. The district court’s allocation of \$964.89 to Rye to purchase a new vehicle is not supported by the record.

Third, Cook challenges Rye’s \$425.83 monthly budget for gas. This expense is not supported by the record. Rye did not provide any evidence to support this expense, and she testified that she does not work outside the home.

Fourth, Cook challenges Rye’s \$779.99 monthly budget for food. It is unclear where Cook obtained this number because the budget Rye submitted includes a monthly budget of \$1,040 for food. However, Rye did not provide any evidence to support this expense and the budget for food for her individually is the same as the monthly marital standard. This expense is not supported by the record.

Fifth, Cook challenges Rye’s \$2,724.99 monthly budget to rent a condominium in Florida, buy airline tickets, and rent a vehicle for four months per year. The district court found that Rye’s request to include expenses related to continuing the parties’ tradition of

spending the winter in Florida was reasonable. This finding is supported by the record and is not clearly erroneous.

Sixth, Cook challenges Rye's budget for a \$4,000 per year charitable contribution. Rye testified that she has historically made charitable contributions and she has committed to donating \$2,000 per year to an organization for which she serves on the board of directors. The district court made a finding consistent with this testimony. Thus, a \$2,000 charitable contribution per year is supported by the record, but a \$4,000 per year contribution is not.

Finally, Cook challenges miscellaneous expenses in Rye's budget, including \$92.08 per month for crown replacements, \$1,500 per year for tax preparation, and a \$1,041.67 per month retirement contribution. The expense for crown replacement is not supported by any evidence in the record. But there is evidence in the record to support the tax preparation fee and the retirement contribution.

Accordingly, we conclude that the district court's finding that Rye's reasonable monthly expenses are \$14,001.82 is clearly erroneous. On remand, it may be helpful for the district court to include specific findings regarding each budget item in its order.

E. The district court's finding that Rye lacks the ability to provide adequate self-support is not clearly erroneous.

Cook argues that the district court erred by finding that Rye is unable to provide adequate self-support and failing to include her earning capabilities in its calculation of spousal maintenance. The district court found that Rye is 62 years old, has a B.A. in child psychology with a certificate in teaching nursery school, and was previously

licensed to teach nursery school. However, the district court found that Rye was last employed outside the home from 1994 until 1996 as an assistant preschool teacher. The district court admitted into evidence a vocational/psychological evaluation of Rye completed by Phillip Haber, Psy.D., and, relying on that report, the district court found that job placement for Rye would be difficult given the date she received her degree and her long absence from the workforce. The district court further found that Rye has several health issues that impede her ability to work. Based on Rye's age, lack of employment history, and her health, the district court determined that she is unable to become self-supporting.

Cook does not contest the accuracy of the sections of the vocational/psychological report on which the district court relies; instead, he contends that Dr. Haber's report supports his argument that Rye is able to contribute to her support. We disagree. The district court's findings are supported by Rye's testimony and Dr. Haber's report. Although Dr. Haber concluded that Rye "is a bright woman who has the ability to engage in a full[-]time job" as a hotel front desk clerk, office worker, receptionist, or information clerk earning between \$9.80 and \$11.31 per hour, he acknowledged that "job placement will be challenging" and "will be complicated by her age, the date of her baccalaureate degree, and her absence from the workforce for 15/16 years." Based on the facts in the record, the district court's finding that Rye is unable to provide adequate self-support is not clearly erroneous.

Because several of the district court's findings of fact are clearly erroneous, we conclude that the district court abused its discretion by awarding Rye permanent spousal

maintenance in the amount of \$19,500 per month. Therefore, we reverse and remand to the district court to recalculate Rye's reasonable monthly expenses at the marital standard of living and to award spousal maintenance consistent with those expenses.

II. The district court abused its discretion by requiring Cook to secure his spousal-maintenance obligation with a \$1 million life insurance policy.

A district court may require security for the payment of spousal maintenance. Minn. Stat. § 518A.71 (2012). “The [district] court has discretion to determine whether the circumstances justifying an award of maintenance also justify securing it with life insurance.” *Maeder v. Maeder*, 480 N.W.2d 677, 680 (Minn. App. 1992) (quotation omitted). “Factors justifying security for a spousal-maintenance award include the obligee’s age, education, vocational experience, and employment prospects.” *Kampf*, 732 N.W.2d at 635. The Minnesota Supreme Court has emphasized the importance of the district court making factual findings regarding the issues of insurability and the cost of insurance. *Lee*, 775 N.W.2d at 642-43.

The district court found that, in the event of Cook’s death, Rye would not have sufficient income to meet her expenses. The district court considered Cook’s proposal to use a portion of a \$1 million life insurance policy that was already in place as part of an irrevocable trust agreement to secure his spousal-maintenance obligation. But the district court rejected the proposal because it was uncertain whether the beneficiaries of the trust would consent to transferring the insurance policy to Rye. The district court ordered Cook to purchase a new \$1 million life insurance policy to secure his spousal-

maintenance obligation, and noted that Cook could choose to stop paying the premium for the current life insurance policy.

Cook argues that the district court abused its discretion by ordering him to purchase a \$1 million life insurance policy to secure his spousal-maintenance obligation. We agree because the district court did not make any findings regarding Cook's insurability and the cost of the insurance. *See Lee*, 775 N.W.2d at 642-43. Those findings are particularly relevant in this case because Cook already has a \$1 million life insurance policy in place. Cook was 52 years old at the time he purchased his current life insurance policy and, over ten years later, it is not clear that Cook would be able to obtain a new \$1 million life insurance policy today. It is also unclear whether Cook would be able to afford the premium for a new policy, which is likely to be substantially higher due to his age. Finally, we note that the recalculation of Rye's reasonable monthly expenses at the marital standard of living and any associated adjustment of Cook's maintenance obligation may allow a policy with less coverage to adequately secure Cook's maintenance obligation.

III. The district court's division of the parties' assets and debts was not an abuse of discretion.

Upon dissolution of a marriage, the district court "shall make a just and equitable division of the marital property of the parties without regard to marital misconduct." Minn. Stat. § 518.58, subd. 1 (2012). The district court's division of the property must be "just and equitable," but it is not required to equally divide the property. *White v. White*, 521 N.W.2d 874, 878 (Minn. App. 1994). A district court has broad discretion over the

division of marital property and this court will not overturn that decision absent a clear abuse of discretion. *Id.* at 877. This court “will affirm the [district] court’s division of property if it had an acceptable basis in fact and principle even though we might have taken a different approach.” *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). We will not set aside the district court’s findings of fact unless they are clearly erroneous. *Id.*

Cook argues that the district court abused its discretion by awarding him almost all of the parties’ debt. “A [district] court’s apportionment of marital debt is treated as a property division and reviewed under an abuse of discretion standard.” *Berenberg v. Berenberg*, 474 N.W.2d 843, 848 (Minn. App. 1991), *review denied* (Minn. Nov. 13, 1991). Like the division of marital property, the division of marital debt must be “just and equitable.” *Id.* In considering whether it is equitable, a district court may consider factors such as the parties’ ability to pay the debt and which party was responsible for incurring the debt. *See Maher v. Maher*, 393 N.W.2d 190, 194 (Minn. App. 1986) (holding that the district court did not abuse its discretion by apportioning all of the parties’ debts to the husband when he had a greater ability to pay); *Dahlberg v. Dahlberg*, 358 N.W.2d 76, 80 (Minn. App. 1984) (concluding that the district court did not abuse its discretion by holding the husband liable for all of the parties’ marital debts when he had greater financial resources and a stable, high-paying job while the wife did not have a job or any specialized skills, and the husband had incurred most of the debts without consulting the wife); *Filkins v. Filkins*, 347 N.W.2d 526, 529 (Minn. App. 1984) (upholding the district court’s apportionment of most of the marital debt to husband when he incurred many of the debts for his own purposes and had a greater ability to pay);

Kreidler v. Kreidler, 348 N.W.2d 780, 784 (Minn. App. 1984) (upholding the district court's award of all of the parties' debts to husband because he had higher income-producing capabilities).

The district court found that it is fair and equitable for Cook to be exclusively liable and responsible for the majority of the parties' debts. The district court considered Rye's argument that, after the parties separated, Cook used marital funds for non-marital purposes, including vacations, shopping, and dining at restaurants with his girlfriend. The district court found that Cook acknowledged that many of the charges included his girlfriend. The district court noted that it was almost impossible to determine which charges that Cook made were clearly for non-marital purposes, but it found that he used a "significant amount of marital funds for non-marital purposes and has the income stream to be able to pay off said debts." Finally, the district court found that Cook was responsible for additional debts that he had voluntarily agreed to assume.

These findings are supported by the record and are not clearly erroneous. And, contrary to Cook's argument, the district court did not impermissibly rely on marital misconduct in apportioning the majority of the parties' debts to Cook. It was relevant for the district court to consider the amount of debt that Cook incurred due to his activities with his girlfriend given Rye's argument that Cook was using marital funds for non-marital purposes. Accordingly, considering Rye's inability to pay the debts, Cook's high-paying job and specialized skills as an attorney, and the fact that Cook incurred numerous expenses for activities that included his girlfriend, the district court did not abuse its discretion by awarding Cook almost all of the parties' debts.

Cook next argues that the district court abused its discretion by awarding the proceeds from the sales of the parties' home in Edina and condominium in Florida to Rye.¹ The district court found that the parties received \$54,741.71 in net proceeds for the sale of their Edina home and \$50,540.06 in net proceeds from the sale of their Florida condominium. The district court found that it was fair and equitable to award all of the net proceeds from those sales to Rye for her to apply toward the purchase of a new home. This finding is supported by the record and is not clearly erroneous. Rye has been living in a townhome owned by her parents since the sale of the parties' Edina home because her lack of income prevents her from qualifying for a mortgage or a lease on her own. In contrast, Cook has a high-paying job and is currently living in his girlfriend's home.

IV. The district court did not abuse its discretion by awarding Rye need-based attorney fees.

Cook challenges the district court's award of \$37,500 in attorney fees to Rye. The district court did not identify which portion of the award was for need-based fees and which portion was for conduct-based fees. *See Geske v. Marcolina*, 624 N.W.2d 813, 816 (Minn. App. 2001) (stating that a district court "must indicate to what extent the award was based on need or conduct or both" because "[t]he standards for making need-based and conduct-based fee awards are different"). However, the district court's analysis of Rye's request for attorney fees indicates that it awarded both need-based and conduct-based attorney fees. *See id.* This court reviews a district court's award of both need-based attorney fees and conduct-based attorney fees in dissolution cases for an

¹ Cook does not challenge the district court's division of the other marital assets.

abuse of discretion. *See Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999) (need-based fees); *In re Adoption of T.A.M.*, 791 N.W.2d 573, 578 (Minn. App. 2010) (conduct-based fees).

Under Minn. Stat. § 518.14, subd. 1 (2012), a district court “shall” award attorney fees “in an amount necessary to enable a party to carry on or contest the proceeding” if it finds that (1) the fees are necessary for the party’s good faith assertion of his or her rights; (2) the payor has the means to pay them; and (3) the recipient of the fees does not have the means to pay them. “Conclusory findings on the statutory factors do not adequately support a fee award.” *Geske*, 624 N.W.2d at 817. But a lack of specific findings on the statutory factors is not fatal to an award for need-based fees “where review of the order reasonably implies that the district court considered the relevant factors and where the district court was familiar with the history of the case and had access to the parties’ financial records.” *Id.* (quotations omitted).

The district court found that Rye does not have sufficient income and assets to pay her attorney fees and costs. The district court found that Rye had to borrow \$5,000 from her daughter to retain an attorney and she has \$71,648.15 in attorney fees and expenses as of July 31, 2012. The district court found that Cook has the ability to pay a portion of Rye’s attorney fees and costs because he continues to generate a high level of income and make substantial expenditures, including travel and contributions to his golf club and charity. These findings are supported by the record and are not clearly erroneous.

Therefore, we conclude that the district court did not abuse its discretion by awarding Rye need-based attorney fees. Although the district court did not clarify which

portion of the award was for need-based fees and which portion was for conduct-based fees, we conclude that \$37,500 was a reasonable need-based attorney fee award given Rye's inability to pay the fees and that the total amount of Rye's attorney fees at the time of the trial was over \$70,000. Because we reach this conclusion, we need not consider whether the district court abused its discretion by awarding attorney fees to Rye based on Cook's conduct.

Affirmed in part, reversed in part, and remanded.